SAMUEL NAIK SIANG TING v. PUBLIC BANK BHD

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP FCJ
ZAINUN ALI FCJ
RAMLY ALI FCJ
AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
[CIVIL APPEAL NO: 02(i)-39-07-2013(A)]
30 SEPTEMBER 2015

LAND LAW: *Indefeasibility of title and interests – Registered proprietor of land entered into Sale and Purchase Agreements ('SPAS') with two different sets of purchasers – New purchasers of land claimed to have better title than earlier purchasers – Earlier purchasers had entered into loan agreements and deeds of assignment with respondent bank – Whether respondent was equitable mortgagee – Whether original vendors of land had become bare trustees after collecting purchase price from earlier purchasers – Whether original vendors had capacity to enter into SPAs with new purchasers – Insufficient instrument – Whether transfer of title arose from void instrument – Whether registration was obtained by means of insufficient or void instrument – Whether appellant/new purchaser of land was bona fide purchaser for valuable consideration – Whether appellant's title was indefeasible – Failure to enter caveats – Whether respondent's failure to enter caveats fatal*

CIVIL PROCEDURE: *Pleadings – Unpleaded issues – Whether court had duty to hear and determine unpleaded issues – Whether raising of issue would completely change character of appellant's defence to respondent's claim – Whether issue would be highly prejudicial to respondent's case*

Majlis Perbandaran Manjung (MPM) was the registered proprietor of a piece of land situated in Sitiawan ('the land'), which was sub-divided into various lots known as Lot 3, Lot 4, Lot 5, Lot 6 and Lot 7 ('the lots') respectively. MPM appointed Bersatu Maju Properties Sdn Bhd ('BMP'), as a developer to develop the land into a mixed development project. Subsequently, MPM and BMY entered into various sales and purchase agreements ('SPAs') for the sale of the lots to five different purchasers ('the earlier purchasers'). Public Bank Bhd ('the respondent') had granted the earlier purchasers loans so as to enable them to finance the purchase of the lots. At the time when the SPAs and the loan agreements were executed, the individual title for each of the lots had not been issued. Thus, in order to facilitate the granting of the loans, the earlier purchasers executed separate deeds of assignment whereby they had assigned absolutely all their respective titles, rights to and interest in the lots in favour of the respondent bank. In addition, MPM and BMP had furnished the respondent with letters of undertaking, whereby MPM and BMP had expressly undertaken to deliver the documents of title to the lots, upon issuance thereof, to the respondent. On the strength of all the loan

A agreements, the deeds of assignment and the letters of undertaking, loans were granted and duly disbursed in full to BMP as the purchase price for the lots. In June 2003, the registrar of land title in Perak, had sub-divided the land and temporary documents of title had been issued in respect of the land. However, the respondent bank was unaware of this and both MPM and BMP
B failed to notify and deliver the individual documents of title to the respondent as agreed in their letters of undertaking. Instead, MPM and BMP had sold the lots to five new purchasers and executed various SPAs with the new purchasers. The title to the lots were then transferred to and registered in the name of the new purchasers. The appellant was one of the new
C purchasers of the land. Upon such discovery, the respondent had lodged private caveats on the lots. In the meantime, the earlier purchasers had defaulted in the repayments of their loans to the respondent, which in turn had caused the respondent to commence civil suits against each of them. In due course, the respondent obtained judgment against the earlier purchasers. The respondent then commenced a civil suit against MPM, BMP and the
D new purchasers wherein it prayed, *inter alia*, for declarations that the earlier purchasers were the rightful owners of the lots, that the respondent was the legal assignee of the titles and interests to the lots by virtue of the deeds of assignment executed in its favour and that the transfers of the lots to the new purchasers were void. The High Court found that the transfers of the lots to
E the new purchasers were void and granted the respondent the declarations it had sought. The High Court also ordered MPM to take steps to cancel the names of the new purchasers from the respective documents of title and to effect registration of the earlier purchasers as the rightful owners of the land. The appellant and two other new purchasers' appeal to the Court of Appeal
F was dismissed. Dissatisfied with the Court of Appeal's decision, the appellant and the two others had applied for and obtained leave to appeal to this court. However, the notice of appeal was only filed by the appellant and the appeals by the others were deemed discontinued. In this appeal, the appellant contended that the High Court and Court of Appeal had erred in
G their findings. The appellant maintained that he had purchased the land from MPM, the registered proprietor of the land and BMP, the developer named as vendor in the SPA. As such, it was the appellant's contention that following the transfer executed in the prescribed form he became the registered proprietor of the land. The appellant also submitted that the
H respondent had only lodged its caveats relating to its loan agreements after the appellant had purchased his lot. As such, the appellant contended that he was a *bona fide* purchaser without notice, who had paid the full purchase price as valuable consideration, and that his title could not be defeated by the respondent's non-registered interest under the SPAs with the earlier purchasers. The respondent argued that the appellant's registered title in the
I lot was not indefeasible under s. 340(2)(b) of the NLC and ought to be set aside as the registration was done by means of an insufficient or void

instrument. At the hearing the appellant raised the unpleaded issue that the SPAs as well as the deeds of assignments executed by the earlier purchasers were void and invalid because at the time the SPAs were executed between MPM and the earlier purchasers, MPM was not the registered owner of the land and thus had no right to deal with it.

Held (dismissing appeal with costs)
Per Ramly Ali FCJ delivering the judgment of the court:

(1) It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded. Based on this principle and case law, the 'last minute' issue raised by the appellant that at the time when the SPAs with the earlier purchasers were executed, MPM was not the registered proprietor of the land should be disregarded and not considered at all in determining the present appeal. The issue raised, if accepted, would completely change the character of the appellant's defence to the respondent's claim and would be highly prejudicial to the respondent's case. As such, for the purpose of the present appeal, only the pleaded case of the parties should be considered. In the premise, the respective SPAs executed by MPM, BMP and the respective earlier purchasers as agreed in the pleadings were valid and enforceable in law. (paras 29-35)

(2) The deeds of assignment executed in favour of the respondent bank were expressly for the purpose of securing the loans given to the earlier purchasers to purchase the lots. Thus, the Court of Appeal was correct in treating the respondent bank as an equitable mortgagee in the present case. As the loan agreement with the appellant was in law an equitable mortgage, it followed that the respondent in the present case became an equitable mortgagee. In the present case, the loan was fully disbursed by the respondent to the developer (BMP) and the earlier purchasers. When the earlier purchasers, as the borrowers in the loan agreements, defaulted in their repayments of the loans it triggered an event of default under the deeds of assignment, which entitled the respondent to invoke cl. 3(a) of the deeds of assignment *ie*, to deal with the land 'absolutely and beneficially'. Further, to strengthen the respondent's rights and interests on the lots, MPM and BMP had issued letters of undertaking in favour of the respondent wherein they consented to the deeds of assignment issued by the earlier purchasers in favour of the respondent and undertook to take all reasonable steps to obtain separate issue documents of title to the land to be delivered to the respondent. The terms of the undertaking were clear and unambiguous. Thus, both MPM and BMP were legally obliged to honour their undertakings. (paras 39-45)

(3) It is settled law that after receipt of the full purchase price and the surrender of possession of the lands to the purchasers, the vendors of the land became bare trustees. It was thus clear that MPM, being the registered proprietor of the land after executing the SPAs with the earlier purchasers and having received the full purchase price, was a bare trustee (that is, a person without beneficial interest in the property). In other words, MPM in the present case, was not permitted in law to sell or transfer the land to the new purchasers, including the appellant. Thus, the Court of Appeal was correct in its finding that the subsequent sale of the lots by MPM to the new purchasers (including the appellant) were *void ab initio*, as MPM did not have any legal or requisite capacity to enter into such agreements. (paras 46-54)

(4) The issue of indefeasibility of title and interest in alienated land is governed by s. 340 of the NLC. Under s. 340(2)(b), the title or interest of any person for the time being registered as proprietor of any alienated land shall not be indefeasible where the registration was obtained by means of an insufficient or void instrument. In the present case, the undisputed facts of the case clearly showed that the SPAs as well as the deeds of assignment with the earlier purchasers were valid and enforceable; and the subsequent SPAs with the new purchasers (including the appellant) were *void ab initio* and of no effect. It followed that their related transfer forms ('Form 14A') should also be void and ineffective to create a registrable transfer. The agreed and undisputed facts of the case support the finding that there was sufficient evidence to show that the said form 14A was in fact a void instrument. (paras 61-70)

(5) In law, a caveat did not create any rights or interest. As such, the failure on the part of the respondent to lodge a caveat timeously, did not in any way negate or defeat its equitable rights, title and interests in respect of the lots. Further, the case of *Jasalam (M) Sdn Bhd* cited by the appellant as authority for its argument that the respondent by its omission had itself to blame for having lost its priority over the lots could be distinguished from the present case. In the present case there were no two parties with valid equitable interests in the land in question but only one party (*ie*, the respondent) who claimed to have an equitable interest in the said land as against the other party (*ie*, the appellant) who had purchased the lot based on a void and invalid sale and purchase agreement and later registered his title thereto based on a void instrument, rendering his title defeasible under s. 340(2)(b) of the NLC. (paras 71-79)

(6) There was no merit in the appellant's argument that he was a *bona fide* purchaser for valuable consideration and therefore by virtue of the proviso to s. 340(3) of the NLC his title to the land was indefeasible.

In the present case, the relevant form 14A in respect of the transfer of the title to the appellant was a void instrument and therefore the appellant's title and interest in the lot was indisputably defeasible. The appellant was an immediate purchaser of the lot in question from its registered proprietor, MPM. That being the case, the appellant clearly could not enjoy the benefit of the proviso to sub-s. (3). As such, once the transfer of the title to the appellant arose from a void instrument, it was liable to be set aside. (paras 80-87)

Bahasa Malaysia *Translation Of Headnotes*

Majlis Perbandaran Manjung ('MPM') adalah pemilik berdaftar sebidang tanah yang terletak di Sitiawan ('tanah') yang dibahagikan kepada pelbagai lot dikenali sebagai Lot 3, Lot 4, Lot 5, Lot 6 dan Lot 7 ('lot-lot'). MPM melantik Bersatu Maju Properties Sdn Bhd ('BMP') sebagai pemaju untuk membangunkan tanah tersebut menjadi projek pembangunan bercampur. Selepas itu, MPM dan BMP menandatangani pelbagai perjanjian jual beli (PJB) untuk penjualan lot-lot kepada lima pembeli-pembeli yang berbeza ('pembeli-pembeli terdahulu'). Public Bank Bhd ('responden') telah memberikan pembeli-pembeli terdahulu pinjaman untuk membolehkan mereka membiayai pembelian lot-lot tersebut. Pada masa apabila PJB dan perjanjian pinjaman dilaksanakan, hak milik individu bagi setiap lot-lot belum dikeluarkan. Justeru, bagi memudahkan pemberian pinjaman, pembeli-pembeli terdahulu memeterai surat ikatan penyerahakkan berasingan di mana mereka telah menyerahkan kesemua hak milik, hak-hak dan kepentingan lot masing-masing yang memihak kepada bank responden. Di samping itu, MPM dan BMP telah membekalkan responden dengan surat aku janji di mana MPM dan BMP telah melaksanakan untuk menyampaikan dokumen hak milik lot-lot apabila dikeluarkan kepada responden. Atas kekukuhan kesemua perjanjian pinjaman, surat ikatan penyerahakkan dan surat aku janji pinjaman-pinjaman telah diberikan dan seharusnya dibayar secara penuh kepada BMP sebagai harga belian bagi lot-lot tersebut. Pada bulan Jun 2003, Pendaftar Hak Milik Tanah Perak telah membahagikan tanah dan dokumen hak milik sementara telah dikeluarkan berkenaan dengan tanah tersebut. Walau bagaimanapun, responden tidak mengetahuinya dan MPM dan BMP gagal untuk memaklumkan dan menyampaikan dokumen hak milik individu kepada responden seperti yang dipersetujui dalam surat aku janji. Sebaliknya, MPM dan BMP telah menjual lot-lot tersebut kepada lima pembeli-pembeli baru dan melaksanakan pelbagai PJB dengan pembeli-pembeli baru. Hak milik kepada lot-lot kemudiannya dipindahkan kepada dan didaftarkan di atas nama pembeli-pembeli baru. Perayu adalah salah satu daripada pembeli-pembeli tanah. Berdasarkan penemuan sedemikian, responden telah memasukkan kaveat persendirian terhadap lot-lot tersebut. Dalam pada itu, pembeli-pembeli terdahulu telah gagal dalam pembayaran

A balik pinjaman mereka kepada responden yang telah menyebabkan responden untuk memulakan saman sivil terhadap setiap seorang daripada mereka. Responden memperolehi penghakiman terhadap pembeli-pembeli terdahulu. Responden kemudiannya memulakan saman sivil terhadap MPM, BMP dan pembeli-pembeli baru di mana ia telah memohon, antara lain, B deklarasi bahawa pembeli-pembeli terdahulu ialah pemilik-pemilik sah lot-lot tersebut, bahawa responden adalah pemegang serah hak sah hak milik dan kepentingan lot-lot menurut surat ikatan penyerahakkan yang dilaksanakan yang memihak kepada mereka dan bahawa pemindahan lot-lot kepada pembeli-pembeli baru adalah tidak sah. Mahkamah Tinggi mendapati C bahawa pemindahan lot-lot kepada pembeli-pembeli baru adalah tidak sah dan memberi deklarasi terhadap responden sepertimana yang dipohon. Mahkamah Tinggi juga memerintah MPM untuk mengambil langkah-langkah bagi membatalkan nama-nama pembeli-pembeli baru dari dokumen hak milik masing-masing dan memberi efek pendaftaran pembeli-pembeli terdahulu sebagai pemilik-pemilik tanah yang sah. Rayuan perayu dan dua D pembeli-pembeli baru lain kepada Mahkamah Rayuan telah ditolak. Tidak berpuas hati dengan keputusan Mahkamah Rayuan, perayu dan dua lain telah memohon dan mendapatkan kebenaran untuk merayu di mahkamah ini. Walau bagaimanapun, notis rayuan hanya difailkan oleh perayu dan rayuan-rayuan yang lain dianggap tamat. Dalam rayuan ini, perayu menghujahkan E bahawa Mahkamah Tinggi dan Mahkamah Rayuan telah terkhilaf dalam dapatan mereka. Perayu menegaskan bahawa dia telah membeli tanah daripada MPM, pemilik berdaftar tanah dan BMP, pemaju yang dinamakan sebagai penjual dalam PJB. Oleh itu, ia adalah hujahan perayu bahawa berikutan dengan pemindahan yang dilaksanakan dalam bentuk yang F ditetapkan dia telah menjadi pemilik berdaftar tanah tersebut. Perayu juga mengemukakan bahawa responden hanya memasukkan kaveat berkaitan dengan perjanjian pinjamannya selepas perayu telah membeli lotnya. Oleh itu, perayu menghujahkan bahawa dia merupakan seorang pembeli *bona fide* tanpa notis yang telah membayar harga pembelian sepenuhnya sebagai G balasan bernilai dan hak miliknya tidak boleh ditewaskan oleh kepentingan tidak berdaftar responden di bawah PJB dengan pembeli-pembeli terdahulu. Responden juga membantah bahawa hak milik berdaftar perayu di lot tidak boleh disangkal di bawah s. 340(2)(b) Kanun Tanah Negara ('KTN') dan harus diketepikan kerana pendaftaran telah dilakukan dengan menggunakan instrumen yang tidak memandai atau tidak sah. Semasa perbicaraan perayu H membangkitkan isu yang tidak diplid bahawa PJB serta surat ikatan penyerahakkan yang dilaksanakan oleh pembeli-pembeli terdahulu adalah tidak sah dan terbatal kerana pada masa PJB dimeterai antara MPM dan pembeli-pembeli terdahulu, MPM bukan pemilik tanah berdaftar dan seterusnya tidak mempunyai hak untuk menguruskannya.

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Diputuskan (menolak rayuan dengan kos)
Oleh Ramly Ali HMP menyampaikan penghakiman mahkamah:

(1) Ia adalah satu kaedah dalam litigasi sivil bahawa pihak-pihak terikat dengan pliding-pliding mereka dan tidak dibenarkan untuk mengemukakan fakta-fakta dan isu-isu yang mereka tidak rayu. Berdasarkan prinsip dan kes undang-undang ini, isu 'saat akhir' itu dibangkitkan oleh perayu bahawa pada masa apabila PJB dengan pembeli-pembeli terdahulu dilaksanakan, MPM bukan pemilik berdaftar tanah tidak akan diambil kira dan dipertimbangkan dalam menentukan rayuan ini. Isu dibangkitkan, jika diterima, akan benar-benar mengubah pembelaan perayu terhadap tuntutan responden dan memprejudiskan kes responden. Oleh itu, untuk tujuan rayuan ini, hanya kes yang diplid oleh pihak-pihak berkenaan akan dipertimbangkan. Dalam premis ini, PJB berkenaan yang dilaksanakan oleh MPM, BMP dan pembeli-pembeli terdahulu seperti yang dipersetujui dalam pliding adalah sah dan berkuat kuasa dalam undang-undang.

(2) Surat ikatan penyerahakkan dilaksanakan bagi pihak bank responden bertujuan menjamin pinjaman-pinjaman yang diberikan kepada pembeli-pembeli terdahulu untuk membeli lot-lot tersebut. Justeru, Mahkamah Rayuan benar dalam menganggap bank responden sebagai pemegang gadai janji berekuiti dalam kes ini. Oleh kerana perjanjian pinjaman dengan perayu adalah dalam undang-undang gadai janji ekuiti, ia mengikuti bahawa responden dalam kes ini menjadi pemegang gadai janji berekuiti. Dalam kes ini, pinjaman telah dikeluarkan sepenuhnya oleh responden kepada pemaju (BMP) dan pembeli-pembeli terdahulu. Apabila pembeli-pembeli terdahulu sebagai peminjam-peminjam dalam perjanjian pinjaman gagal dalam pembayaran balik pinjaman-pinjaman mereka, ia mencetuskan keingkaran di bawah surat ikatan penyerahakkan yang membenarkan responden untuk menggunakan kl. 3(a) surat ikatan penyerahakkan iaitu untuk menguruskan tanah 'secara mutlak dan berguna'. Selanjutnya, untuk mengukuhkan hak dan kepentingan responden terhadap lot-lot tersebut, MPM dan BMP telah mengeluarkan surat aku janji memihak kepada responden di mana mereka bersetuju dengan surat ikatan penyerahakkan yang dikeluarkan oleh pembeli-pembeli terdahulu yang memihak kepada responden dan berusaha untuk mengambil semua langkah-langkah munasabah untuk mendapatkan dokumen isu hak milik berasingan bagi tanah untuk diberikan kepada responden. Syarat-syarat aku janji itu adalah terang dan jelas. Justeru, kedua-dua MPM dan BMP bertanggungjawab dari segi undang-undang untuk menghormati aku janji mereka.

(3) Adalah undang-undang matan bahawa undang-undang selepas pembelian harga pembelian penuh dan penyerahan milikan tanah kepada pembeli-pembeli, penjual-penjual tanah itu menjadi pemegang-pemegang

A amanah. Oleh itu, adalah jelas bahawa MPM sebagai pemilik berdaftar tanah selepas memeterai PJB dengan pembeli-pembeli terdahulu dan setelah menerima harga pembelian penuh ialah seorang pemegang amanah (iaitu seseorang tanpa kepentingan benefisial dalam harta tersebut). Dalam erti kata lain, MPM dalam kes ini tidak dibenarkan
B dalam undang-undang untuk menjual atau memindahkan tanah kepada pembeli-pembeli baru termasuk perayu. Justeru, Mahkamah Rayuan adalah betul dalam dapatannya bahawa penjualan lot-lot yang berikutnya oleh MPM kepada pembeli-pembeli baru (termasuk perayu) adalah *void ab initio* kerana MPM tidak mempunyai keperluan undang-undang atau
C kapasiti untuk memasuki perjanjian tersebut.

(4) Isu hak milik dan kepentingan tanah yang tidak boleh disangkal termaktub dalam s. 340 KTN. Di bawah s. 340(2)(b), hak milik atau kepentingan mana-mana orang pada masa itu yang didaftarkan sebagai pemilik tanah tidak boleh disangkal di mana pendaftaran telah diperoleh
D dengan cara yang tidak cukup atau instrumen yang tidak sah. Dalam kes ini, fakta-fakta yang tidak boleh dipertikaikan menunjukkan bahawa PJB serta surat ikatan penyerahakkan dengan pembeli-pembeli terdahulu adalah sah dan boleh dikuatkuasakan; dan PJB berikutnya dengan pembeli-pembeli baru (termasuk perayu) adalah *void ab initio* dan tiada
E efek. Ia diikuti bahawa borang-borang pemindahan (borang 14A) juga adalah tidak sah dan tidak berkesan untuk mewujudkan pemindahan berdaftar. Fakta-fakta yang dipersetujui dan tidak dipertikaikan dalam kes ini menyokong dapatan bahawa terdapat bukti yang lengkap untuk menunjukkan bahawa borang 14A tersebut sebenarnya adalah instrumen
F yang tidak sah.

(5) Dari segi undang-undang, kaveat tidak mewujudkan apa-apa hak atau kepentingan. Oleh itu, kegagalan responden untuk memasukkan kaveat pada masanya tidak dalam apa cara menafikan atau menewaskan hak-hak ekuiti, hak milik dan kepentingan berkenaan lot-lot tersebut.
G Selanjutnya, kes *Jasalam (M) Sdn Bhd* yang disebut oleh perayu sebagai autoriti dalam penghujahannya bahawa responden melalui peninggalannya perlu mempersalahkan dirinya sendiri kerana telah kehilangan keutamaannya ke atas lot-lot boleh dibezakan daripada kes ini. Dalam kes ini, tidak ada dua pihak yang mempunyai kepentingan
H ekuiti sah terhadap tanah berkenaan tetapi hanya satu pihak (iaitu responden) yang menuntut untuk mempunyai kepentingan ekuiti tanah berkenaan terhadap pihak lain (iaitu perayu) yang telah membeli lot berdasarkan perjanjian jual beli yang tidak sah dan terbatal dan kemudiannya mendaftar hak miliknya berdasarkan instrumen yang tidak sah menjadikan hak miliknya disangkal di bawah s. 340(2)(b) KTN.
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(6) Tiada merit dalam hujah perayu bahawa dia merupakan seorang pembeli *bona fide* balasan bernilai dan dengan itu menurut proviso kepada s. 340(3) KTN hak miliknya terhadap tanah tersebut tidak boleh disangkal. Dalam kes ini, borang 14A mengenai pemindahan hak milik kepada perayu adalah instrumen yang tidak sah dan oleh itu hak milik perayu dan kepentingan dalam lot tidak boleh disangkal. Perayu adalah pembeli terdekat lot yang diperkatakan daripada pemilik berdaftar MPM. Oleh itu, perayu dengan jelas tidak dapat menikmati manfaat kepada proviso sub-s (3). Dengan itu, sebaik sahaja pemindahan hak milik kepada perayu dibangkitkan daripada instrumen yang tidak sah, ia harus diketepikan. (perenggan 80-87)

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***
Ambank (M) Bhd v. Luman Kamil Mohammed Don [2012] 3 CLJ 551 FC ***(refd)***
Anuar Mat Amin v. Abdullah Mohd Zain [1989] 1 LNS 74 HC ***(refd)***
ARRM Arunasalam Chetty Son Of Sithambaram Chetty v. Teah Ah Poh Trading Under The Style Of Mun Seng Hin Kee; Teah Soo Chew Trading Under The Style Of Teah Chin Seng [1936] 1 LNS 80 ***(refd)***
Blay v. Pollard & Morris [1930] 1 KB 628 ***(refd)***
Butler v. Fairclough 23 CLR 78 ***(refd)***
Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd [2004] 1 CLJ 357 CA ***(refd)***
Chua Hee Hung & Ors v. QBE Supreme Insurance Bhd [1990] 1 CLJ 669; [1990] 1 CLJ (Rep) 49 SC ***(refd)***
Chuah Eng Khong v. Malayan Banking Bhd [1999] 2 CLJ 917 FC ***(refd)***
CPR v. District Registrar of Dauphin Land Titles Office [1956] 4 DLR (2nd) 518 ***(refd)***
Hadley v. London Bank of Scotland 12 (LT) 747 ***(refd)***
Hj Mohamed Dom v. Sakiman [1955] 1 LNS 26 HC ***(refd)***
Hon Ho Wah & Anor v. United Malayan Banking Corporation Bhd [1994] 2 CLJ 587 SC ***(refd)***
Jasalam (M) Sdn Bhd v. Wong Koon Yee [2000] 2 CLJ 377 CA ***(dist)***
Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***
Karuppiah Chettiar v. Subramaniam [1971] 1 LNS 43 FC ***(refd)***
KEP Mohamed Ali v. KEP Mohamed Ismail [1980] 1 LNS 169 FC ***(refd)***
Kiaw Aik Hang Co Ltd v. Tan Tien Choy [1963] 1 LNS 59 HC ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***
Lysaght v. Edwards [1876] 2 Ch D 499 ***(refd)***
Mook Meng Sun v. Loo Aa Kau & Ors [2002] 2 CLJ 142 HC ***(refd)***
Ng Kheng Yeow v. Chiah Ah Foo & Ors [1987] 2 CLJ 108; [1987] CLJ (Rep) 254 SC ***(refd)***
Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***
Puran Singh v. Kehar Singh Bahadur Singh [1937] 1 LNS 51 HC ***(refd)***
State Government of Perak v. Muniandy [1985] 1 LNS 117 SC ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

A *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors [1974] 1 LNS 175 FC* ***(refd)***
The Chartered Bank v. Yong Chan [1974] 1 LNS 178 ***(refd)***
United Malayan Banking Corporation Bhd v. Goh Tuan Laye & Ors [1975] 1 LNS 187 FC ***(refd)***

B **Legislation referred to:**
Civil Law Act 1956, s. 4(3)
National Land Code, ss. 340, (2)(b), (3)(a), (b)
Rules of the High Court 1980, O. 14A

Other source(s) referred to:
C David SY Wong, *Tenure and Land Dealings in the Malay States*, pp 368, 418
Sir Robert Megarry & HWR Wade, *The Law Of Real Property*, 5th edn, p 914

For the appellant - Ranjan N Chandran (Gobind Singh Deo & Joanne Chua Tsu Fae with him); M/s Ranjan Chitravathy & Nik
For the respondent - Yoong Sin Min (Poh Choo Hoe with her); M/s Shook Lin & Bok

D *[Editor's note: For the Court of Appeal judgment, please see Samuel Naik Siang Ting & Ors v. Public Bank Bhd [2015] 6 CLJ 914 (affirmed).]*

Reported by Vani Krishnan

E **JUDGMENT**

Ramly Ali FCJ:

[1] This is an appeal against the concurrent findings of the High Court and the Court of Appeal allowing the respondent's claim against the appellant *vide* encl. 62, pursuant to O. 14A of the Rules of the High Court 1980 (RHC).
F The appellant before us is one Samuel Naik Siang Ting who was the first defendant at the High Court while the respondent is Public Bank Berhad who was the plaintiff there.

[2] Leave to appeal to this court was granted to the appellant and two others, namely – Lee Soo Eng and Ti Moek Hua, on 19 June 2013. However,
G notice of appeal was filed only by the appellant. The others had not filed their notices of appeal and did not appear in court during the hearing of the appeal before us. Therefore, their appeals are deemed discontinued.

Factual Background

H **[3]** This matter was dealt with summarily under O. 14A of the RHC. Based on the statement of agreed facts the factual background leading to the present appeal before us are as follows.

[4] At all material time, Majlis Perbandaran Manjung (MPM) (the sixth defendant at the High Court) was the registered proprietor of a piece of land
I held under master title HS(D) Dgs 11103, PT No. 4108, Mukim Sitiawan,

District of Manjung (the land) before it was sub-divided. The land was subsequently sub-divided into various lots known as Lot 3, Lot 4, Lot 5, Lot 6 and Lot 7 (the lots). A

[5] MPM, *vide* a joint venture agreement dated 19 November 1998 appointed a company known as Bersatu Maju Properties Sdn Bhd (BMP) (the tenth defendant at the High Court), as a developer to develop the land into a mixed development project including three-storey shop offices thereon. B

[6] Thereafter, on various dates (between 10 October 2001 and 21 January 2002) MPM and BMP executed various sales and purchase agreements in relation to the lots in favour of the following purchasers – namely, Mohd Yusoff bin Baharom (Lot 3); Ong Kee Chai and Ong Lai King (Lot 4); Wong Siew Ming (Lot 5); Ong Sang Huat Holdings Sdn Bhd (Lot 6); and Lim Peng Guan and Beatrice Veronica Arulappen (Lot 7). For the purpose of the present appeal, all the abovenamed purchasers are collectively referred to as "the earlier purchasers". C D

[7] The respondent, at the request of the earlier purchasers had granted loans to enable them to finance the purchase of the lots. For that purpose various letters of offer were issued and various loan agreements were executed between the respondent and the respective earlier purchasers. E

[8] At the material time, when the sale and purchase agreements and the loan agreements were executed, the individual title for each of the lots had not been issued yet. Thus in order to facilitate the granting of the loans, the earlier purchasers executed separate deeds of assignment whereby they assigned absolutely all their respective titles, rights to and/or interest in the lots in favour of the respondent. As an added security for the loans, MPM and BMP furnished the respondent with letters of undertaking, whereby MPM and BMP expressly undertook to deliver the documents of title to the lots, upon issuance thereof, to the respondent to facilitate the execution of the relevant memorandums of transfer in favour of each of the earlier purchasers and the execution of legal charges in favour of the respondent. F G

[9] On the strength of all the loan agreements, the deeds of assignment and the letters of undertaking, loans were granted and duly disbursed in full to BMP as the purchase price for the lots in question.

[10] Unknown to the respondent, the land (comprising of the lots) was subsequently sub-divided and temporary documents of title were issued by the Registrar of Land Title, Perak on or about 27 June 2003. MPM and BMP failed to notify and deliver the individual documents of title to the respondent as agreed in their letters of undertaking. Sometimes in November 2004, the respondent discovered that MPM and BMP had sold the lots to the first to fifth defendants (including the appellant herein), and executed various H I

A sale and purchase agreements with them (the new purchasers). The title to the lots were then transferred to and registered in the name of the new purchasers, including the appellant.

[11] Upon such discovery, the respondent, lodged private caveats on the lots. In the meantime, the earlier purchasers defaulted in the repayments of
B their loans to the respondent. The respondent commenced civil suits against each of them and accordingly obtained judgment against them.

At The High Court

[12] The respondent commenced the present action on 26 July 2007 against
C MPM, BMP and the new purchasers, asking, *inter alia* for:

(a) a declaration that the earlier purchasers were the rightful owners of their respective lots;

(b) a declaration that the respondent was the legal assignee of the titles and
D interests to the lots by virtue of the deeds of assignment dated 16 October 2001, 30 November 2001, 13 December 2001 and 22 January 2002 which was executed by the earlier purchasers in favour of the respondent;

(c) a declaration that the subsequent sale and purchase agreements dated
E 22 March 2004 and 11 January 2005, between MPM and BMP with the new purchasers (defendants 1, 2, 3, 4 and 5) were void; and

(d) a declaration that the transfers of the lots to the new purchasers were *void ab initio* and that the registration of such transfers be set aside.

F The respondent also prayed for other consequential reliefs and damages to be awarded.

[13] A default judgment was entered against BMP, and a consent judgment was recorded against MPM. With regard to the other defendants (the new purchasers), the respondent applied for judgment summarily pursuant to an
G O. 14A application. As indicated in his affidavit-in-reply to encl. 62, the appellant (as the first defendant) agreed with the respondent that the matter could be dealt with summarily under O. 14A and need not go for full trial.

[14] The legal questions for determination in the O. 14A application were as follows:

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(a) whether the respondent is an equitable mortgagee having an absolute assignment of rights, titles and interests in the lots under the sale and purchase agreements;

(b) whether the subsequent sales and/or conveyances of the lots by MPM
I and BMP to the new purchasers are *void ab initio*;

(c) whether the alleged registered titles of the first defendant (the appellant herein), second and third defendants in lots 5, 6 and 7 are defeasible and hence, liable to be set aside; and

(d) whether the fourth and fifth defendants have any caveatable interest in lots 3 and 4.

[15] On 27 July 2011, the High Court after hearing the parties answered all the questions in favour of the respondent and accordingly allowed the respondent's claims. The High Court made various orders in favour of the respondent (in Bahasa Malaysia), the effects of which can be summarised as follows:

(a) a declaration that the earlier purchasers were the rightful owners of the lots in question;

(b) a declaration that the plaintiff (the respondent herein) was the legal assignee of the titles and interests to the said property by virtue of the various deeds of assignment dated 16 October 2001, 30 November 2001, 13 December 2001 and 22 January 2002;

(c) a declaration that the sale and purchase agreements dated 22 March 2004 and 11 January 2005 entered into by the first, second, third, fourth and fifth defendants (the new purchasers) and the sixth and tenth defendants (MPM and BMP) are void and set aside;

(d) a declaration that the transfers of the lots to the first, second, third, fourth and fifth defendants were *void ab initio*; and all the defendants are to surrender their respective documents of title to the lots within seven days from the date of this order;

(e) an injunction to prohibit the first, second, third, fourth and fifth defendants or their respective agents from entering into any dealings to sell, transfer, charge, lease and to carry out any physical activities on the said property.

(f) that MPM be ordered to take steps to cancel the new purchasers' names in the respective documents of title and to effect registration of the earlier purchasers as the rightful owners of the lots; failing which, the Registrar shall carry out the order within seven days from the date of its written notification.

At The Court Of Appeal

[16] The appellant and two other defendants then appealed to the Court of Appeal against the above decision. On 22 March 2012, the appeal was unanimously dismissed with costs. In affirming the decision of the High Court, the Court of Appeal made, *inter alia*, the following findings:

(a) that the earlier purchasers have assigned absolutely all their rights, titles and interests under the sale and purchase agreements of the lots in

A question to the respondent; and the deeds of assignment are treated as equitable mortgages and the respondent is an equitable mortgagee of the earlier purchasers rights, titles and interests in respect of the lots;

(b) that the subsequent sales, transfers and conveyance of the lots by MPM and BMP to the new purchasers (including the appellant) without the B respondent's consent are *void ab initio*; because:

(i) upon receipt of the full payment of the purchase price on 13 February 2003, MPM being the registered owner became a bare trustee and has no right to deal with the lots;

C (ii) that as a bare trustee, MPM does not have any legal or requisite capacity to enter into the sale and purchase agreements dated 22 March 2004 and 11 January 2005 with the new purchasers;

(c) that since the sale and purchase agreements with the new purchasers (including the appellant) and the instruments of transfer are void, it D follows that the purported registered titles to the new purchasers (including the appellant) in the lots are defeasible and ought to be set aside by virtue of s. 340(2)(b) of the National Land Code (the NLC); and

(d) that s. 340(3) of the NLC did not confer any protection to the first and third defendants who claimed that they were the immediate purchasers E of lots 5 to 7. The registered titles of the first and third defendants for lots 5 to 7 ought to be set aside.

Leave Question

[17] Dissatisfied with the Court of Appeal's decision, the appellant F together with two other defendants filed an application for leave to appeal to this court. On 19 June 2013, this court granted leave to appeal on the following question:

> whether the title of *bona fide* registered owner without notice under the NLC can be defeated by a nonregistered interest of an assignee/lender G under an earlier sale and purchase agreement in respect of the same piece of land with other purchasers other than the 1st Applicant.

However, as we have said notice of appeal was filed only by the appellant and the appeals by the others are deemed discontinued.

H **Appellant's Submissions**

[18] Before us, learned counsel for the appellant submitted that, on the undisputed facts of the case, the decision of the High Court was erroneous, and in consequence the decision of the Court of Appeal, affirming the High Court decision, was also wrong.

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[19] Learned counsel also submitted that "in the year 2004, following the sub-division of the subject property, and the individual titles issued therefor the appellant purchased the subject land from MPM, the registered proprietor of the subject property and BMP, the developer, named the vendor in the sale and purchase agreement; and following the transfer executed in the prescribed form the appellant became the registered proprietor of the subject land on the 6 December 2004".

[20] Learned counsel further submitted that the respondent lodged its private caveats relating to its loan agreements with the earlier purchasers only in 2005. When the appellant purchased his lot in 2004, the registered proprietor of the lot was MPM and there was no other impediment for the purchase and the subsequent transfer of the lot to the appellant. Therefore, the respondent has only itself to blame for having lost its priority over the lot and for its failure to protect its interest immediately after the loan agreements were executed with the earlier purchasers.

[21] It is also submitted by learned counsel that in purchasing the lot from MPM, the appellant had no knowledge whatsoever of the earlier transactions involving the earlier purchasers; and therefore by virtue of the registration, the appellant had acquired a legal interest (not merely an equitable interest) and an indefeasible title in the lot. The appellant claimed that ground of judgment he was a *bone fide* purchaser without notice who had paid the full purchase price as valuable consideration, and therefore his title over the lot could not be defeated by the respondent's non-registered interest under the earlier sale and purchase agreements with the earlier purchasers in respect of the lots.

Respondent's Submissions

[22] The respondent, on the other hand, argued that the appellant's registered title in the lot was not indefeasible under s. 340(2)(b) of the NLC and ought to be set aside as the registration was done by means of an "insufficient or void instrument". The respondent further argued that at the time when the appellant executed his sale and purchase agreement in respect of the lot on 22 March 2004, the earlier purchasers (as borrowers of the loans granted by the respondent) were fully vested with the rights, titles and interests to the lots, and such rights, titles and interests have been absolutely assigned to the respondent *vide* the deeds of assignment duly executed by them.

[23] The respondent further argued that since MPM and BMP as the vendor had received the full purchase price from the earlier purchasers (as disbursed by the respondent), MPM had become a bare trustee to the lots for the earlier purchasers, and later by virtue of the deeds of assignment, for the respondent; and therefore MPM was not in a capacity to subsequently sell

A or transfer the lots to the appellant and the other new purchasers. Thus MPM was not permitted to enter into the sale and purchase agreements with them in respect of the lots.

[24] The respondent contended that the relevant Forms 14A in respect of the transfers of the titles to the lots to the new purchasers (including the B appellant) were consequently void and there can be no rights, titles or interests conveyed to the new purchasers. As a bare trustee, MPM was no longer vested with the rights to the lots and as such did not have any legal authority to execute the sale and purchase agreements. The appellant's title was therefore defeasible. The respondent argued that being an immediate C purchaser the appellant was precluded from availing himself to the protection under the proviso to s. 340(3) of the NLC and the title ought to set aside pursuant to s. 340(2)(b) of the NLC.

[25] On the issue of the failure to lodge a caveat, the respondent submitted that a caveat does not create any interest or encumbrance in land; and the D respondent's rights as equitable mortgagee of the said lots are not prejudiced by the absence of private caveat lodged by the respondent.

[26] The respondent, therefore, urged this court to answer the leave question in the affirmative and to dismiss the appeal with costs.

E **Appellant's Unpleaded Issue**

[27] Based on the pleadings as well as the statements of agreed facts between the parties, at the time when MPM entered into the sale and purchase agreements with the earlier purchasers on various dates between 10 October 2001 and 21 January 2002, MPM was the registered proprietor/ F owner of the land in question. This fact has been agreed upon and not disputed at all at the High Court, the Court of Appeal as well as during main submissions before us in the present appeal. Even during the respondent's application for an O. 14A proceeding at the High Court, the appellant had clearly indicated to the truth of the fact that MPM, at the material time, was G the registered proprietor/owner of the land when the sale and purchase agreements were executed with the earlier purchasers. Being an agreed issue, this point of MPM being a registered owner was not raised at all by either party at the High Court as well as at the Court of Appeal or even at the stage of the main submissions of the present appeal before us. Neither was it H mentioned in the written submissions by both counsel filed before us. It was only during submission-in-reply before us that the co-counsel for the appellant, Mr Gobind Singh Deo raised this new issue by drawing our attention to Borang 11A (Suratan Hakmilik Sementara), Kanun Tanah Negara in respect of the land in question (at pp. 107-109 of the rekod rayuan I jld 2), where he claimed that there was an endorsement to show that at the time when the respective sale and purchase agreements were executed between MPM and the earlier purchasers between 10 October 2001 and

21 January 2002, MPM was not the registered proprietor/owner of the land and thus had no right to deal with it, as the land had earlier been surrendered and vested in the state authority on 3 September 2000. Therefore counsel claimed that the sale and purchase agreements as well as the deeds of assignments executed by the earlier purchasers were void and invalid.

[28] This is totally a new issue raised by the appellant's co-counsel before us at the submission-in-reply stage. It was not pleaded at all. It went against the pleaded case of the appellant himself (as well as the respondent) that at the material times, MPM was the registered proprietor/owner of the land and that the existence of the sale and purchase agreements with the earlier purchasers, the deeds of assignment in favour of the respondent as well as the letters of undertaking issued by MPM and BMP in favour of the respondent were not disputed at all. Clearly, the respondent was caught by surprise.

Our Findings On This Issue

[29] It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (see: *State Government of Perak v. Muniandy* [1985] 1 LNS 117; [1986] 1 MLJ 490; and *Anuar Mat Amin v. Abdullah Mohd Zain* [1989] 1 LNS 74; [1989] 3 MLJ 313). In *Blay v. Pollard & Morris* [1930] 1 KB 628, Scrutton LJ ruled that: "Cases must be decided on the issues on the record; and if it is desired to raise other issues there must be pleaded on the record by amendment."

[30] The Supreme Court in *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428, had also emphasised the importance of pleadings and ruled that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal (see also *Ambank (M) Bhd v. Luqman Kamil Mohammed Don* [2012] 3 CLJ 551; [2012] MLJU 56 FC).

[31] On the same issue, HRH Raja Azlan Shah FJ (as HRH then was) in *The Chartered Bank v. Yong Chan* [1974] 1 LNS 178; [1974] 1 MLJ 157, had also pointed out that "as the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and new trial ordered" (see also: *Haji Mohamed Dom v. Sakiman* [1955] 1 LNS 26; [1956] MLJ 45; and *Kiaw Aik Hang Co Ltd v. Tan Tien Choy* [1963] 1 LNS 59; [1964] MLJ 99).

[32] Based on the above observation and principle, we are of the view that the "last minute" issue raised by Mr Gobind Singh Deo, co-counsel for the appellant, that at the time when the sale and purchase agreements with the earlier purchasers were executed, MPM was not the registered proprietor/owner of the land must be disregarded and not to be considered at all in

A determining the appeal before us. In doing so, we adopt the observation by HRH Raja Azlan Shah CJ (as HRH then was) in *KEP Mohamed Ali v. KEP Mohamed Ismail* [1980] 1 LNS 169; [1981] 2 MLJ 10:

> As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the Defendant was taken by surprise.
B To condemn a party on a ground of which no material facts have been pleaded may be a great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

[33] The issue raised, if accepted, would completely change the character of the appellant's defence to the respondent's claim and would be highly
C prejudicial to the respondent's case.

[34] For the purpose of the present appeal, we will only consider the pleaded case of the parties before us. To borrow the words of Gopal Sri Ram JCA in *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357, "... once a defendant takes that course, he
D must stand and fall on his pleaded case; we cannot simultaneously put forward an unpleaded case ..."

[35] In the premise, we are of the view that the respective sale and purchase agreements executed by MPM, BMP and the respective earlier purchasers as agreed in the pleadings are valid and enforceable in law. It follows that all
E the related deeds of assignment executed by the earlier purchasers in favour of the respondent as well as the letters of undertaking issued by MPM and BMP in favour of the respondent and the loan agreements executed by the earlier purchasers and the respondent are also valid and enforceable in law.

F **Deeds Of Assignment**

[36] Clause 1 of the deeds of assignment, provides that the appellant as the borrower and the assignor, "hereby ASSIGNS ABSOLUTELY to the bank the full and entire benefit of the assignor's rights title and interest whatsoever in and to and under the sale and purchase agreement and the related
G document(s) and in the said property together with the assignor's right of enforcement thereof or thereunder as security for the said loan".

[37] It also provides that "the assignor shall and hereby undertakes to continue to observe perform and be bound by all whatever conditions covenants and stipulations therein ... contained in the sale and purchase
H agreement, the related document(s) and as contained in the loan agreement."

[38] Under cl. 3(a) thereof, if the assignor shall commit a default pursuant to the terms of the deed or if any of the events of default in the loan agreement shall happen or at any time after the loan secured shall have become immediately repayable to the respondent under the loan agreement, the
I respondent shall be entitled without notice to the assignor "to enter upon and

take possession of the said property or any part or parts thereof and to deal with all the rights and interest of the bank in relation to the said property or otherwise in all respect as the person absolutely and beneficially entitled thereto."

[39] At the time when the loan agreements were signed, the earlier purchasers had no legal ownership to the lots as the land had not been sub-divided and the documents of title had not been issued. The deeds of assignment executed in favour of the respondent were expressly for the purpose of securing the loans given to the earlier purchasers to purchase the lots.

[40] We agree with the Court of Appeal that the deeds of assignment in the present case are treated as equitable mortgages (where the respondent was an equitable mortgagee) of the earlier purchasers' rights, titles and interests under the sale and purchase agreements.

[41] The law on assignment is governed by s. 4(3) of the Civil Law Act 1956, which provides:

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the rights of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[42] The effect of an absolute assignment was explained at length by the Federal Court in *Chuah Eng Khong v. Malayan Banking Bhd* [1999] 2 CLJ 917, 920 as follows:

> At common law and under the relevant rules of equity, the said loan agreement would amount to an equitable mortgage because the assignment of the right, title and interest in the said land was expressly or obviously for the purpose of securing the loan given to the borrower to purchase the said land. The said loan agreement is not an out-and-out purchase of the said land. This view is reinforced by the promise that when the document of title of the said land was available after the completion of the subdivision aforesaid, the borrower would execute a charge in favour of the lender according to the provisions of the National Land Code (hereinafter called "the Code"). It is true that nowhere in the said loan agreement has the word "mortgage" been used, but it is a security transaction in connection with the loan given by the lender with a provision for repayment after which, the borrower "shall be entitled ... to obtain a discharge and release of the said lot from the Lender, (see

A cl. 27 of the said loan agreement). Thus we have the loan, the contractual right to repay or to redeem the said land and the assignment of all "right title and interest" in the said land pending the exercise of such contractual right to redeem. The said loan agreement therefore, at common law, will be a mortgage. It would be an equitable mortgage (and not a legal mortgage) because the borrower at the time of signing the said loan B agreement had no legal estate (or registered proprietorship of a grant of land etc.) but only an equitable interest as a purchaser by contract from a housing developer, pending the issuance of a separate document of title aforesaid. In other words, it is a mortgage in equity for which the actual form of words is immaterial provided the meaning is plain when interpreting a document as a mortgage or equitable mortgage, see *William* C *Brandt's Sons and Co. v Dunlop Rubber Co. Ltd* [1905] AC 454, 462.

[43] As the loan agreement with the appellant is in law an equitable mortgage, it follows that the respondent in the present case became an equitable mortgagee. In *The law of Real Property* (5th edn.) by Sir Robert D Megarry and HWR Wade at p. 914, the learned authors state that "a mortgage is a conveyance of property legal or equitable subject to a right of redemption." This concept of equitable mortgage has been recognised by the Federal Court in *Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621; [2002] 2 MLJ 513, where it was held:

E All things considered, we were more inclined to agree with learned counsel for the Appellant, in particular with his submission that in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realise its security under an absolute assignment of rights to land, the court should give effect to and recognise the contractual rights as determined between the vendor and the F purchaser".

[44] We are in full agreement with the above principle. In the present case, the loan was fully disbursed by the respondent by 13 February 2003 to the developer (BMP), and the earlier purchasers, as the borrowers in the loan agreements defaulted in their repayments of the loans as stipulated under G cl. 1.1 thereof, thus triggering an event of default under cl. 30.1. That being the case, the respondent was entitled to invoke cl. 3(a) of the deeds of assignment ie "to deal with all the rights and interest in relation to the said property absolutely and beneficially."

[45] To strengthen the respondent's rights and interests on the lot, MPM H and BMP had issued letters of undertaking in favour of the respondent. In the said letters of undertaking dated 13 December 2001, MPM consented to the deeds of assignment issued by the earlier purchasers in favour of the respondent and undertook to take all reasonable steps to obtain separate issue documents of title to the land and, subsequently, to deliver to the respondent I "the separate document of title to the said property upon issue thereof together with the registrable transfer in favour of the assignor or any other documents as shall be incumbent upon us to produce to secure the registration of the assignor as the registered proprietor of the said property

within six months from the date hereof." The terms of the undertaking are clear and unambiguous. Therefore, both MPM and BMP are legally obliged to honour their undertakings.

Bare Trustee

[46] It is not in dispute that the land was subsequently subdivided into various lots and temporary documents of title in respect of the lots were issued by the Registrar of Land Titles, Perak on or about 27 June 2003. MPM and BMP failed to notify the respondent, and to deliver to the respondent the documents of title with the registrable transfer in favour of the respondent as agreed in their letters of undertaking. In fact, the lots were sold to third parties (including the appellant) after the relevant documents of title were issued. Upon discovery of the subsequent sale, the respondent lodged private caveats on the lots. Clearly, MPM had committed a breach of the undertakings given earlier in favour of the respondent.

[47] As indicated earlier, there were valid sale and purchase agreements in respect of the lots between MPM, BMP and the earlier purchasers. In law, the lots had already been sold by MPM and BMP to the earlier purchasers, who had paid the full purchase price by 13 February 2003. Therefore the earlier purchasers were fully vested with the rights, titles and interests to the lots which rights, titles and interests were in turn absolutely assigned to the respondent as the lender.

[48] In this regard, Jessel MR in *Lysaght v. Edwards* [1876] 2 Ch D 499 had the occasion to explain the meaning of the term "valid contract" or "valid agreement" in a sale transaction and its effect in law. At p. 507 of the report, His Lordship said "Valid contract means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser a contract binding on both parties."

[49] It was clearly stated in that case that the effect of a contract for sale has been settled for centuries. At p. 506, His Lordship explained the following legal doctrine:

> It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest).

[50] His Lordship (in *Lysagh*'s case) also adopted an earlier authority where Lord Justice Turner in *Hadley v. London Bank of Scotland* 12 (LT) 747 held:

> I have always understood the rule of the Court to be that if there is a clear valid contract for sale the Court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by *lis pendens*. I think this rule well founded in principle, for the property is in equity transferred to the purchaser by the contract; the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him.

[51] Back home, the above principle had been adopted and followed by the Federal Court in *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors* [1974] 1 LNS 175; [1974] 2 MLJ 45 where it was held:

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the Appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat.

[52] In that case, the Federal Court concluded:

> We are of the view that the vendors, having parted with their interest in the land to the appellants, are bare trustees and have no interest in the land over which a valid caveat can be lodged.

(See also: *Karuppiah Chettiar v. Subramaniam* [1971] 1 LNS 43; [1971] 2 MLJ 116; and *Hon Ho Wah & Anor v. United Malayan Banking Corporation Berhad* [1994] 2 CLJ 587; [1994] 2 MLJ 393).

[53] We are in full agreement and adopt the above well founded principles of law which, according to Jessel MR in *Lysaght*'s case, "has been settled for centuries". Applying the said principles to the facts of the present case before us, we hold that MPM, being the registered proprietor of the land after executing the sale and purchase agreements with the earlier purchasers and having received the full purchase price, was a bare trustee (that is, a person without beneficial interest in the property); and to borrow the words of Jessel MR in *Lysaght*'s case ... "the court will not permit the vendor afterwards to transfer the legal estate to a third person." In other words, MPM in the present case, was therefore not permitted in law to sell or transfer the land to the new purchasers (including the appellant).

[54] The Court of Appeal was right in finding that MPM, after having entered in the sale and purchase agreements with the earlier purchasers and received the full payments of the purchase price, had become a bare trustee and as such was not permitted to deal with the lots. We are in agreement with the Court of Appeal that the subsequent sales, transfers or conveyances of the lots by MPM to the new purchasers (including the appellant) were *void ab initio*, as MPM did not have any legal or requisite capacity to enter into such agreements.

Indefeasibility Of Title And Interest – s. 340 Of The NLC

[55] It is not in dispute that in the year 2004, after the land had been sub-divided and documents of title issued, MPM and BMP entered into subsequent sale and purchase agreements with the new purchasers (including the appellant). The appellant claimed that he had no knowledge whatsoever of the earlier dealings in respect of the land. The appellant had paid the full purchase price for the said purchase and a prescribed transfer form (Form 14A) was executed in his favour on 30 September 2004. The appellant claimed that he became the registered proprietor of the lot purchased by him when the transfer form was registered on 6 December 2004. At the material time the respondent had not lodged any caveat on the land following its loan agreements with the earlier purchasers. The respondent only lodged its private caveats in the year 2005 after realising the fact relating to the sales and transfers of the lots to the new purchasers (including the appellant) by which time they had already become the registered proprietors of the lots.

[56] The appellant argued that as at the date of his registration as the registered proprietor of the lot (on 6 December 2004) there was absolutely no impediment to the sale and transfer of the lot and the registration of its title in his favour. The appellant further claimed that by virtue of the registration of the title to his name, he had acquired a legal interest in the lot (which was a registered proprietor and not merely an equitable interest) and therefore such legal interest which was acquired by him must necessarily take precedence over any unregistered equitable interest that the respondent may possibly have in the lot.

[57] The appellant submitted that in the circumstances his interest in the lot was indefeasible and must stand indefeasible under s. 340 of the NLC. The respondent, on other hand claimed that the appellant's sale and purchase agreement with MPM in respect of the lot was ineffective and incapable of conferring any rights to him as the relevant transfer form (Form 14A) in respect of the lot which was executed by MPM pursuant to the void sale and purchase agreement, was also invalid and therefore no interest could be conveyed through it to the appellant. The respondent claimed that the said Form 14A was an "insufficient or void instrument".

[58] The issue of indefeasibility of title and interest in alienated land is governed by s. 340 of the NLC. Section 340(1) provides:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

[59] The exceptions to the above rule are spelt out in s. 340(2) which provides:

> (2) The title or interest of any such person or body shall not be indefeasible:

A (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

B (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[60] Section 340(3) provides for situations where a defeasible title or interest can be set aside, subject to who and an exception in the proviso where the title or interest is acquired by any purchaser in good faith and for C valuable consideration. The subsection reads:

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstance specified in subsection (2):

(a) it shall be liable to be set aside in the hands of any person or body D to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested.

Provided that nothing in this subsection shall affect any title or interest E acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[61] The question for determination before us brings into focus the statutory rights of a registered land proprietor/owner as conferred by the statutory provisions under s. 340 of the NLC as against an equitable right of F an unregistered interest of an assignee or lender under an earlier sale and purchase agreement and deed of assignment in respect of the same piece of land.

[62] The question as to what extent the rules of equity are recognised and applied by our courts was explained by the Federal Court in *Chuah Eng* G *Khong v. Malayan Banking Bhd* [1999] 2 CLJ 917, where it was held that "Rules of equity in general are applicable by virtue of the Civil Law Act 1956 and those rules of equity relating to equitable interests in land have no doubt always been recognised and applied in Malaysia unless they are expressly or by necessary implication precluded by the Code. This view has H been asserted and reasserted in a number of cases in the appellate courts in Malaysia."

[63] The issues of "equitable interest in land" and "equitable mortgagee" had been dealt with in *ARRM Arunasalam Chetty Son Of Sithambaram Chetty v. Teah Ah Poh Trading Under The Style Of Mun Seng Hin Kee; Teah Soo Chew* I *Trading Under The Style Of Teah Chin Seng* [1936] 1 LNS 80; [1937] MLJ 17, where the Court of Appeal then, unanimously held that the deposit of the documents of title as security for repayment of debts, operated as an

equitable charge by virtue of which the party who lent the money acquired an equitable interest in the land covered by the document of title. It was also held that the creditor therein was also an equitable mortgagee by the deposit of the document of title and decided that the security did not contravene the provisions of the Kedah Land Code, which was based on the FMS Land Enactment 1911 and the Registration of Titles Enactment 1911, all in fact based on the Torrens system of registration of titles.

[64] It is also appropriate refer to a passage in the judgment of by Terrell, Ag CJ (FMS) in that case (*Arunasalam Chetty*) where at pp. 21 and 23, His Lordship said:

> The learned Judge of the First Division appears to consider that the proviso makes equitable principles inapplicable in cases of immoveable property. But there is nothing in the Land Code which so provides. An equitable mortgage by deposit is not a charge contravening the express terms of the Land Code; it is a form of security quite outside the Land Code to which effect may be given as a contract *inter parties*, and which can only be implemented by means of an order of Court. That such interests may exist as contracts *inter personas*, and quite outside any registration of titles enactment is fully recognised by the Privy Council in the case of *Abigail v. Lapin* [1934] AC 491, the principle of which decision was recently adopted by the FMS Court of Appeal in the case of *AMM Murugappa Chetty v. S. Seenivasagam and Others* (1936) F.M.S.L.R. 33: [1936] MLJ 217
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> It is the duty of the Court to do justice between parties, and unless expressly prohibited by Statute law, to give effect to ordinary commercial transactions, such as the advance of money on the security of title deeds. Registration of titles was introduced to prevent fraud, but to use it for the purpose of prohibiting, or rendering nugatory, ordinary commercial transactions not expressly covered by the Enactment, is to enable the Enactment to be used as an instrument of fraud. Even in the Federated Malay States, therefore, the Courts have found themselves constrained again and again to apply equitable principles, not because English equitable principles apply, but because the application of such principles is in accordance with natural justice. I would refer in particular to the case of *Boase v. Cluny Rubber Estates Ltd, and Others*, 2 F.M.S. Law Reports. p. 130 and the more recent case of *Arumugam v. The Motor Emporium* (1933-34) F.M.S.L.R. 21; [1933] MLJ 276.

[65] There is nothing in the NLC which expressly or by necessary implication excludes or prohibits any equitable interest in alienated land, and the court ought to give effect to ordinary commercial transactions and not to invalidate any equitable mortgage created by contracts outside any statutory provisions for registration of title under the NLC.

[66] Under s. 340(2)(b), the title or interest of any person for the time being registered as proprietor of any alienated land shall not be indefeasible where the registration was obtained by means of an insufficient or void instrument.

[67] In "Tenure and Land Dealings in the Malay States" by David SY Wong, at p. 364 the author explained the phrase "insufficient or void instrument" for the purpose of s. 340(2)(b) of the NLC as follows:

> (iv) "Insufficient or void instrument" Section 340(2)(b) also provides that a registered title is defeasible where registration was obtained "by means of an insufficient or void instrument". Unlike "forgery", the expression "insufficient or void instrument" is so wide as to defy comprehensive enumeration of the circumstances in which a purportedly executed instrument of dealing may be regarded by the court as "insufficient" or "void". Some general observations may indicate how wide its domain may be. The reference to the insufficiency and voidness of an instrument could pertain to all sorts of circumstances and matters relating to the execution of the instrument. Where the instrument is executed in pursuance of a contract of dealing, the invalidity of contract (i.e. where the contract is void) would plainly entail that the instrument is void accordingly. The instrument may also be "insufficient" or "void" for reasons relating to the capacity of the parties concerned, or by reason of some formal defect or irregularity. In addition, non-compliance with relevant statutory requirements may also result in the instrument being regarded as "insufficient" or "void".

[68] The same issue was dealt with by our court in *Puran Singh v. Kehar Singh Bahadur Singh* [1937] 1 LNS 51; [1939] 8 MLJ 71 where it was held that the memorandum of transfer in that case was not signed by an authorised attorney as required under ss. 110 and 180 of the relevant Land Code and therefore the said memorandum of transfer was declared to be an insufficient instrument and that the registration by means of the transfer was void by virtue of the proviso of s. 42(iii) of the relevant Land Code which provides that: "If the registration of any proprietor, chargee or lessee has been obtained by forgery or by means of an insufficient or void instrument, such registration shall be void."

[69] The appellant argued that the respondent's contention that his registered title or interest in the subject lot was defeasible because its registration was obtained by means of insufficient or void instrument was very seriously flawed on the facts of the matter as well as the law on the ground that there was nothing to suggest and there was no evidence to show that the relevant Form 14A was an insufficient or void instrument within the meaning of s. 340(2)(b) of the NLC. The appellant cited the decision of the High Court in *Mook Meng Sun v. Loo Aa Kau & Ors* [2002] 2 CLJ 142; [2002] 2 MLJ 193, where Abdul Aziz J held that for an instrument to be regarded as an insufficient or void instrument, there must be something about the instrument itself that renders it insufficient or void. However in that case, as a matter of fact, the learned judge found that there was no evidence as to that as regards the instrument of transfer.

[70] In the present case, as we have shown earlier the undisputed facts of the case clearly show that the sale and purchase agreements as well as the deeds of assignment with the earlier purchasers are valid and enforceable; and the subsequent sale and purchase agreements with the new purchasers (including the appellant) are *void ab initio* and of no effect. It follows that their related transfer forms (Form 14A) must also be void and ineffective to create a registrable transfer. The agreed and undisputed facts of the case support the finding that there is sufficient evidence to show that the said Form 14A was in fact a void instrument.

Failure To Lodge Caveat

[71] The appellant also touched on the respondent's failure to lodge its private caveats following its loan agreements with the earlier purchasers timeously so as to protect its interest in respect of the dealings in the lots. The appellant contended that the respondent, by its own indolence and omission had itself to blame for having lost its priority over the lots in question; and such failure was fatal to its case. He cited the case of *Jasalam (M) Sdn Bhd v. Wong Koon Yee* [2000] 2 CLJ 377; [2000] 3 MLJ 115 to support his contention that "the respondent, although being the first in time acquiring the equitable ownership to the land, has lost his priority by his indolence and omission to enter a caveat within reasonable time."

[72] Under the Torrens system, caveat is devised for the protection of non-registrable interest on alienated land by allowing the caveator to be notified thereon in some manner. A caveat (so long as it continues in force) has the effect that the land in question shall not be transferred, charged or leased by the proprietor until such notice shall have been served on the caveator. The NLC allows a person or body of persons to lodge a private caveat for the protection of his caveatable interest which he claims he is entitled to. The right to lodge a caveat is not dependent on the validity of the particular interest claimed. It is the claim of an interest within the category of caveatable interest that alone matters. (see: "*Tenure and Land Dealings in the Malay States*" by David SY Wong at p. 418).

[73] It must be emphasised here that in law, a caveat does not create any rights or interest. This was explained by Tritscher J in *CPR v. District Registrar of Dauphin Land Titles Office* [1956] 4 DLR (2nd) 518 in the following words:

> It is trite law that caveats are to be used for the protection of alleged as well as proved interests and that a caveat is merely a warning which creates no new rights but protects existing rights, if any.

(see also: *Chua Hee Hung & Ors v. QBE Supreme Insurance Bhd* [1990] 1 CLJ 669; [1990] 1 CLJ (Rep) 49; [1990] 1 MLJ 480).

[74] The proposition was lucidly affirmed and adopted by Suffian LP in *United Malayan Banking Corporation Bhd v. Goh Tuan Laye & Ors* [1975] 1 LNS 187; [1976] 1 MLJ 169, where it was held that an equitable interest

A in land was not affected by the absence of a caveat, "as a caveat in itself does not create an interest but merely gives notice to the world of the presence of an interest belonging to someone other than the registered proprietor."

[75] In *Ng Kheng Yeow v. Chiah Ah Foo & Ors* [1987] 2 CLJ 108; [1987] CLJ (Rep) 254; [1987] 2 MLJ 330, the Supreme Court held that even though the B respondent (in that case) failed to lodge a caveat, it did not deprive him in having a better equity against the appellant (in that case) who had lodged a caveat; the reason being that the appellant had nothing to caveat as the vendors had already sold all his interest to the respondent there.

C **[76]** Lee Hun Hoe CJ (Borneo), in delivering the Supreme Court's judgment in *Chua Hee Hung & Ors* reaffirmed the proposition as follows:

> In our judgment, the appellants' failure to lodge private caveats to protect their beneficial interests in the lands does not advance the case of the respondents in as much as the prohibitory order could not override the beneficial interest of the appellants in the properties attached. Moreover, D the effect of entry of a caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent or until the caveat is removed by a court order.

[77] Adopting the above principle to the facts of the present case before us, we find that the failure on part of the respondent to lodge a caveat timeously, E does not in any way negate or defeat its equitable rights, titles and interests in respect of the lot in question.

[78] The case of *Jasalam (M) Sdn Bhd* as cited by the appellant earlier can be distinguished. The issue in that case is different from the issue in the F present case. There, the Court of Appeal was considering, *inter alia*, the priority of two parties with valid equitable interest in the land in dispute. In that case, the Court of Appeal followed the principle established in an Australian case of *Butler v. Fairclough*, 23 CLR 78, that in "the case of a contest between two equitable claimants, the first in time, all other things equal, is entitled to priority." G

[79] In our view the principle as adopted in *Jasalam (M) Sdn Bhd* cannot be applied to the present case for the simple reason that in the present case we are not dealing with two parties with valid equitable interests in the land in question; but with one party (ie, the respondent) who claimed to have an H equitable interest in the said land as against the other party (ie, the appellant) who had purchased the lot based on a void and invalid sale and purchase agreement and later registered his title thereto based on a void instrument, rendering his title defeasible under s. 340(2)(b) of the NLC.

Proviso To Section 340(3) Of The NLC

I **[80]** The issue of the proviso to s. 340(3) of the NLC was also raised before us. The appellant claimed that he was a *bona fide* purchaser for valuable consideration and therefore by virtue of the proviso to s. 340(3) of the NLC, his title to the land was indefeasible.

[81] The proviso reads:

> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or any person or body claiming through or under such a purchaser.

[82] The issue of the applicability of the proviso was dealt with at great length by the Federal Court in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1. In that case, the court ruled, *inter alia*, as follows:

(a) that the said proviso is not applicable to other subsections in s. 340 of the NLC; it is only applicable and directed to sub-s. (3) alone and not the earlier sub-sections; and

(b) that even though s. 340(3)(a) and (b) make reference to the circumstances specified in the earlier s. 340(2), they are restricted only to subsequent transfer of the land in question; so it could not apply to the immediate transferee of any title or interest in the land.

[83] It is pertinent to note that, in that case (*Tan Ying Hong*) the Federal Court overruled its earlier decision in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133; [2001] 1 MLJ 241 on the ground that the Federal Court in *Adorna Properties* had erroneously misconstrued s. 340(1), (2) and (3) of the NLC and came to a wrong conclusion that the proviso to sub-s. (3) applied equally to s. 340(2). At paras. 51, 52 and 53 or the judgment, Arifin Zakaria CJ (Malaya) (as he then was) said:

> [51] We are of the view that the proviso is directed towards the provision of sub-s (3) alone and not to the earlier subsection. This in our view is supported by the use of the words 'in this subsection' in the proviso. Therefore, its application could not be projected into the sphere or ambit of any other provisions of s 340.
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> [52] Furthermore, even though sub-s. (3)(a) and (b) refer to the circumstances specified in sub-s. (2) they are restricted to subsequent transfer or to interest in the land subsequently granted there out. So it could not apply to the immediate transferee of any title or interest in any land. Therefore, a person or body in the position of *Adorna Properties* could not take advantage of the proviso to the sub-s. (3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s. (3) ought not to be extended as was done by the court in *Adorna Properties*, to apply to sub-s. (2)(b). By so doing, the court had clearly gone against the clear intention of Parliament. This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest.
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> [53] For the above reasons, with respect, we hold that the Federal Court in *Adorna Properties* had misconstrued s. 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s. (3)

A equally applies to sub-s. (2). By so doing, the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision of s 340 of the NLC.

[84] The principle established in *Tan Ying Hong* was adopted and followed by this court in a recent case of *Kamarulzaman Omar & Ors v. Yakub Husin &* B *Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768 where at para. 43, Jeffrey Tan FJ said:

> In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were *bona fide* purchasers. But unfortunately, both the trial court and the Court of Appeal failed to C inquire whether the fifth and or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from *Tan Ying Hong* that the *bona fides* of an immediate purchaser is not a shield to defeasibility. The defeasible title of a *bona fide* immediate D purchaser is still liable to be set aside. The defeasible title of a *bona fide* immediate purchaser only becomes indefeasible when it is subsequently passed to a *bona fide* subsequent purchaser. That the fifth and sixth respondents were *bona fide* purchasers could not by that fact alone give a shield of indefeasibility. The fifth and or sixth respondents only acquired an indefeasible title if they were *bona fide* subsequent purchasers. But for E the fifth and sixth respondents to have been *bona fide* subsequent purchasers, there must have been an immediate purchaser in the first place. The first to fourth respondents, from whom the fifth and sixth respondents obtained title, were not immediate purchasers. Rather, they were imposters of those entitled to the estate of the deceased. They, like the fake Boonsom who impersonated the true Boonsom, had no title to F pass to the fifth and sixth respondents. The fifth and sixth respondents who were the immediate purchasers, acquired a title that was not indefeasible. But when the fraudulent title of the first to fourth respondents were set aside by the default judgment, the defeasible title of the fifth and sixth Respondents was also defeated.

G **[85]** In the present case, as we have stated earlier the relevant Form 14A in respect of the transfer of the title to the appellant was a void instrument and therefore the appellant's title and interest in the lot was indisputably defeasible. The appellant was an immediate purchaser of the lot in question from its registered proprietor, MPM. That being the case the appellant H clearly could not enjoy the benefit of the proviso to sub-s. (3). Once the court is satisfied that the transfer of the title to the appellant arose from a void instrument, to borrow the words of Arifin Zakaria CJ (Malaya) in *Tan Ying Hong*, "it automatically follows that they are liable to be set aside".

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Conclusion

[86] Accordingly, for reasons already given we would answer the question posed to us in the affirmative:

> that the title of registered proprietor who was a *bona fide* immediate purchaser without notice under the National Land Code (Act 56 of 1965) can be defeated by the non-registered valid equitable interest of an absolute assignee under an earlier sale and purchase agreement in respect of the same piece of land with another purchaser who was not the appellant.

[87] In the premise, we dismiss the present appeal with costs. We uphold and affirm the decisions and orders made by the High Court (which were upheld and affirmed by the Court of Appeal).